

1 July 25, 2011

2 CHARGING PARTIES' STATEMENT TO SUPPORT  
3 OVERTURNING THE GENERAL COUNSEL'S DENIAL OF  
4 COMPLIANCE DETERMINATION APPEAL

5 Ralphs Grocery Company  
6 Case Nos. 31-CA-27160, 31-CA-27475, and 31-CA-27685

7 Charging Parties submit this statement to support its request for review of the  
8 General Counsel's decision denying its appeal of the Region's Compliance  
9 Determination in Ralphs Grocery Company, Case 31-CA-27160, et al. For the reasons  
10 stated herein, the Board should overturn the General Counsel's decision and the Region  
11 should order Respondent Ralphs Grocery Company (hereinafter "Ralphs") to comply  
12 with the Ninth Circuit Order in the manner detailed below.

13 STATEMENT OF FACTS

14 From October 12, 2003 until February 26, 2004, Ralphs locked out more than  
15 19,000 employees from about 325 of its stores during the course of its negotiations with  
16 Charging Parties for a new collective bargaining agreement. During the lockout, Ralphs  
17 rehired "more than 1000 bargaining unit employees" under false names, identities and  
18 Social Security numbers, causing the U.S. Attorney to begin a two-year investigation in  
19 January 2004. *Ralphs Grocery Company*, 352 NLRB 128, 131 (2008).

20 During September and October 2004, Mary Kasper (hereinafter "Kasper"),  
21 Ralphs' Vice President for Human Resources and Senior Counsel, sent two sets of  
22 letters to employees, including those who Ralphs rehired during the lockout under false  
23 names, false identifies, false I-9 forms and false Social Security numbers. In the letters  
24 from Kasper, Ralphs informed employees of the U.S. Attorney's investigation and  
25 requested that they complete and return a questionnaire asking for their current  
26 information and information about their employment during the lockout. Ralphs also  
27 conducted an internal investigation and audit of its lockout hiring activities.

28 On December 14, 2004, Charging Parties requested that Ralphs furnish  
information identifying the employees it rehired during the lockout, the false names

1 and Social Security numbers used, their actual names and Social Security numbers,  
2 copies of letters and documents presented by employees in response to the Kasper  
3 letters, and the scope and findings of Ralphs' internal audit. Ralphs refused to produce  
4 anything on several grounds, including that the information Charging Parties sought  
5 was irrelevant to the parties' bargaining relationship. Ralphs denied Charging Parties'  
6 repeated requests for information.

7 Charging Parties filed a grievance with Ralphs on May 12, 2005, over Ralphs'  
8 alleged discrimination against the previously locked-out workers, and its preference in  
9 the terms and conditions of employment for the rehired employees who worked during  
10 the lockout. Charging Parties repeated their information requests in connection with  
11 this grievance, and again through October 2005. Ralphs continuously refused to furnish  
12 any information on the same basis initially asserted.

13 On December 15, 2005, a federal grand jury indicted Ralphs for various counts  
14 related to the rehiring of employees under false names, false identities, false I-9 forms  
15 and false Social Security numbers. On July 26, 2006, Kasper, representing Ralphs, pled  
16 guilty to the felony counts of conspiracy, false representation of Social Security  
17 numbers, identity fraud, falsifying and concealing material facts in matters within  
18 federal agency jurisdiction, and concealment of facts related to employee benefit plans.  
19 *Plea Agreement for Defendant Ralphs Grocery Company* at 12, 52, *U.S. v. Ralphs Grocery*  
20 *Company*, No. CR 05-1210-PA (C.D. Cal. June 30, 2006), *see also Indictment, U.S. v. Ralphs*  
21 *Grocery Company*, No. CR-05-1210-PA (C.D. Cal. June 2004).<sup>1</sup>

22 On February 19, 2008, the Board issued a decision that Ralphs violated Sections  
23 8(a)(1) and 8(a)(5) of the National Labor Relations Act by refusing to produce  
24 information requested by Charging Parties regarding Ralphs' use of false Social  
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27 <sup>1</sup> "The plea agreement and indictment in *U.S. v. Ralphs Grocery Company* were entered  
28 into the record at the Administrative Law Judge level, however, Charging Parties will  
furnish them to the Board upon request.

1 Security numbers and false identities for bargaining unit employees rehired during the  
2 2003-2004 lockout.<sup>2</sup>

3 The Board filed an application for enforcement of its Decision and Order with the  
4 Court on April 11, 2008 to compel Ralphs to comply with the Board's Order.<sup>3</sup>

5 Ralphs entered into a stipulation with the Board on December 4, 2008, signed by  
6 Ralphs' outside counsel, Timothy Ryan (hereinafter "Ryan"), agreeing to comply with  
7 all elements of the Board Order within 28 days of the stipulation.<sup>4</sup> The Board agreed to  
8 withdraw its enforcement application with the Ninth Circuit upon compliance.

9 After months of Ralphs' failure to comply with extended stipulation deadlines, the  
10 Board moved its enforcement application before the Ninth Circuit forward on July 6,  
11 2009.

12 The Court granted the Board's enforcement order on November 19, 2009,  
13 directing Ralphs to:

14 "1. Cease and desist from

15 (a) Refusing to provide the Charging Party Unions with the requested  
16 Information described in the Board's decision that is relevant and  
17 necessary to the Unions' responsibilities as exclusive collective-bargaining  
representatives of the Respondent's employees.

18 (b) In any like or related manner interfering with, restraining, or coercing  
19 employees in the exercise of the rights guaranteed them by Section 7 of  
the Act.

22 <sup>2</sup> The decision found that Ralphs did not commit an unfair labor practice when it  
23 withheld as attorney-client privilege, information Charging Parties requested about the  
24 internal audit that investigated Ralphs' hiring of bargaining unit employees under false  
names, false I-9 forms and false Social Security numbers during the lockout (this issue is  
pending before the Board and at the Ninth Circuit Court of Appeals).

25 <sup>3</sup> Since Charging Parties filed a petition for review of the Board's Decision and Order  
26 with the Ninth Circuit on March 10, 2008, the Board requested that its application be  
consolidated with Charging Parties' petition.

27 <sup>4</sup> Ralphs and the Region agreed that Ralphs should hold off on posting and mailing  
28 notices until Charging Parties' appeal was complete, in case the Ninth Circuit ordered  
changes in the notice language.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days of the Order, Ralphs provide the Charging Party Unions with the information requested by them and described in the Board's Decision, including information relating to the Respondent's hiring of bargaining unit employees under false names during the 2003-2004 lockout.
- (b) Within 14 days after service by the Region, post at its facilities throughout California copies of the attached notice marked 'Appendix.' Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices to employees are customarily posted. In the event that the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities at any time after December 23, 2004.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

(hereinafter "Ninth Circuit Order" or "Ninth Circuit Judgment") *Judgment, National Labor Relations Board v. Ralphs Grocery Company*, No. 08-71507 (9th Cir. November 19, 2009).<sup>5</sup>

On December 31, 2009, Ralphs produced 2,500 pages of information to Charging Parties, many of which were blank. The documents identified approximately 160 bargaining unit employees hired under false names and Social Security numbers during the 2003-2004 lockout. Upon reviewing the documents, Charging Parties informed the Region in a February 3, 2010 letter that the production was incomplete. Charging Parties demanded that Ralphs submit an affidavit detailing the steps taken to

<sup>5</sup> The Ninth Circuit issued a subsequent order on August 23, 2010, vacating the Board's judgment pursuant to the Supreme Court's finding in *New Process Steel, L.P., v. NLRB*, 130 S. Ct. 2635 (2010) that the Board lacked the authority to issue decisions as a two-member quorum of a three-member group, as was done in this case. The Ninth Circuit vacated its prior decision, and the full Board issued its decision and order on September 30, 2010, adopting the February 19, 2008 opinion of the 2-member Board.

1 locate and produce the documents requested as was required by the Ninth Circuit  
2 Judgment.

3 On February 10, 2010, Ralphs filed a certification from Personnel Director  
4 Millie Smith alleging that Ralphs posted remedial notices at its approximately 325 stores  
5 throughout California starting February 10, 2010. A second certification from Smith  
6 stated that notices were mailed on February 9, 2010, to over 1,400 current and former  
7 employees who worked at Ralphs facilities that had closed.

8 On April 15, 2010, four months after Ralphs produced documents for  
9 Charging Parties, Ralphs submitted certifications of its compliance efforts.  
10 One certification was from Monique DeGuia-Jones (hereinafter "DeGuia-Jones"), one of  
11 several Senior Labor Relations Representatives covering Southern California.  
12 The second certification was from Ryan, Ralphs' outside counsel. Upon review of the  
13 certifications, Charging Parties asserted their objections in a June 18, 2010 letter to the  
14 Region; namely the accuracy and thoroughness of the information provided as well as  
15 concerns that neither DeGuia-Jones nor Ryan possess knowledge of Ralphs store  
16 operations, and neither individual provided details of their duties or responsibilities,  
17 or established their ability to identify responsive information and documents.  
18 Charging Parties also raised substantial concerns over the inadequacy of Ralphs' efforts  
19 to comply with the Ninth Circuit Order.

20 On October 22, 2010, the Board issued an opinion in *J&R Flooring, Inc.* published  
21 at 356 NLRB No. 9, requiring respondents in Board cases to distribute or post remedial  
22 notices electronically when that is a regular means of communication with employees  
23 or members. Charging Parties contacted the Region on October 29, 2010 to ensure  
24 Ralphs would post the remedial notices electronically, consistent with the Board's  
25 directive and practice of applying new policies retroactively to open cases in all stages,  
26 particularly if the new policy addresses a remedial issue. The Region responded almost  
27  
28

1 six months later on March 4, 2011, declining to enforce the Board's electronic notice  
2 posting requirement on the basis that the requirement did not "apply to cases which the  
3 Board order has already issued..." E-mail from Brian Gee to Laurence Steinsapir  
4 (March 4, 2011).

5 The Region's response came one day after it issued its March 3, 2011 Compliance  
6 Determination to close the case after finding that Ralphs satisfied the Ninth Circuit  
7 Order. Charging Parties appealed the Region's determination to the General Counsel  
8 on April 18, 2011.

9 On June 22, 2011, the General Counsel issued a decision to deny Charging  
10 Parties' appeal of the Region's Compliance Determination.

#### 11 ARGUMENT

12 The Region's March 3, 2011 Compliance Determination states that  
13 "[a]bsent evidence of non-compliance, the Region concluded that Respondent fully  
14 complied with its obligations under the Board order." The Region should look to  
15 affirmative evidence of compliance rather than presume the Company has complied.  
16 The Region's back seat approach to compliance that places a heavy burden on  
17 Charging Parties to present evidence of an employer's noncompliance is precisely the  
18 reason employers such as Ralphs repeatedly refuse to take seriously Board remedies  
19 and consequences or consider them as a deterrent to committing unfair labor practices.  
20 The Board should take pride in enforcing its own order.

21 Ralphs failed to comply with the Ninth Circuit Order in this case because it did  
22 not produce to Charging Parties the information it was ordered to produce, the Notice  
23 posting and mailings were insufficient and unspecified, and nothing in the certifications  
24 of compliance show that they were given by responsible or knowledgeable officials of  
25 Ralphs. The certifications failed to identify the chain of custody of documents, the  
26 certifiers' personal knowledge about the information and documents requested, or even  
27 their roles, duties and responsibilities. The certifications themselves prove Ralphs was  
28 not compliant.

1           A.     **Ralphs Failed To Disclose Documents Responsive To Charging Parties'**  
2                   **Information Requests**

3           The Ninth Circuit ordered Ralphs to produce to Charging Parties the name of  
4 each employee who worked under a false name or Social Security number during the  
5 2003-2004 lockout, the false name and number used, the dates employed under the false  
6 identity, and other information about the employees. Ralphs was also to present copies  
7 and descriptions of all responses to the approximately 15,000 Kasper letters sent by  
8 Ralphs to its employees.

9           The General Counsel supported the Regional Director's finding that "absent any  
10 specific evidence to establish that there is information available that was not produced,  
11 it was concluded that the Respondent has complied with the Board Order."

12 *General Counsel Letter to Charging Parties*, Case Nos. 31-CA-27160, et al. (June 22, 2011).

13 The General Counsel ignores the evidence presented by Charging Parties without any  
14 explanation.

15           The Region found it compelling that Ralphs furnished over 2,500 pages of  
16 documents to Charging Parties. Charging Parties stated in its appeal and state here  
17 again, that the documents produced were incomplete and nonresponsive to the  
18 information request for several reasons. To begin, included in the 2,500 pages were  
19 many blank pages. But more importantly, Ralphs produced only 750 documents in  
20 response to the 15,000 Kasper letters mailed out (a mere 5% response). Ralphs also  
21 identified only 160 bargaining unit employees that were hired under false names and  
22 false Social Security numbers during the 2003-2004 lockout, even though the Board  
23 found that *over 1,000 bargaining unit employees were rehired. Ralphs Grocery Company*,  
24 352 NLRB at 131. Even the U.S. Attorney's criminal indictment confirmed that Ralphs  
25 at least "hired and employed hundreds of locked-out employees to work during the  
26 lockout" under false names and Social Security numbers. *Indictment* at 19, *Ralphs*.  
27 The ALJ and the U.S. Attorney's factual findings provide specific evidence that Ralphs'  
28 information disclosure was deficient.

1 And finally, Ralphs failed to disclose other information requested about  
2 employees such as "the employee's... false name and social security number, the dates  
3 employed under a false identity, the positions in which the employee worked during  
4 the lockout, the employee's straight-time rates of pay during the lockout, and the store  
5 numbers at which such employment took place."

6 **B. Evidence Of Notice Postings And Mailings Were Insufficient**

7 The Ninth Circuit Order required Ralphs to post notices in all of its California  
8 stores for *60 consecutive days* in *conspicuous places*, and to mail notices to all current  
9 and former employees who were working at facilities Ralphs had since closed.

10 The General Counsel states in its denial that "Respondent had properly posted  
11 and mailed Notices for a sixty day period" based on Ralphs' certifications.

12 *General Counsel Letter*. It fails to address the absence of any information about specific  
13 locations where notices were posted within the store, or the steps taken to ensure  
14 notices were mailed to the correct employees.

15 Section 10518.4, *Respondent Effectuation of Posting*, from the NLRB Casehandling  
16 Manual on Compliance Proceedings, requires the following:

17 "A responsible official of the respondent must sign and date notices before  
18 posting them, and submit two signed and dated copies of the notice to the  
19 Region, along with a certification of posting... the certificate of posting must be  
20 completed to indicate the date and all locations of posting. In addition to this  
initial report, the respondent should be asked to report at the end of the posting  
period that the copies were continuously and conspicuously posted."

21 It further explains in Section 10518.2 that "[e]xamples of posting locations  
22 include employee bulletin boards, timeclocks, department entrances, meeting hall  
23 entrances, and dues-payment windows. Small facilities may require only one notice;  
24 large facilities may require a great number."

25 Ralphs submitted an attachment with its certification that notices were posted in  
26 stores, and identified the store name, number and address. Smith certified that she  
27 would "provide by location the date(s) said Notices were taken down." *Millie Smith*  
28 *Certification*, Case Nos. 31-CA-27160, et al. (February 10, 2010).



1 Without information about the specific location within each store where notices  
2 were posted, the Region cannot ensure that the notices were posted in "conspicuous  
3 places including all places of [the intranet where notices to employees are customarily  
4 posted." *Ralphs*, 352 NLRB at 129-130. Ralphs was required to certify to the specific  
5 locations within its stores where it posted the required notices. The Region should not  
6 absolve Ralphs of this requirement simply because it committed unfair labor practices  
7 in hundreds of stores rather than just a few, making it more laborious for the Company  
8 to obtain the required information. The information in the certifications was  
9 insufficient and did not comply with the Ninth Circuit Order. Compliance has been  
10 treated as "done" without sufficient evidence.

11 Smith's statement certifying that Notices were mailed is similarly deficient, as it  
12 includes no information about how the mailings were done, the type of postage used,  
13 or any other details about the mailings including which notices were returned  
14 undelivered. This must be reviewed.

15 Finally, the Ninth Circuit ordered that the certifications be from "a responsible  
16 official." Smith's certifications provide no information about her duties, responsibilities  
17 or any other evidence that she is a responsible official who would have knowledge over  
18 the matters about which she is certifying. As a Personnel Director, Smith may have  
19 information about employees formerly working at stores that had since closed, but it is  
20 inconceivable how she can be the appropriate, responsible official to certify to whether  
21 Notices were posted in over 300 stores on the certified dates. Indeed, it is no surprise  
22 that her certifications lacked the posting locations within each store or information  
23 about the individual responsible for the posting. The store reporting structure rises  
24 from the store manager through regional managers who report to the Executive Vice  
25 President of Store Operations, never to a Personnel Director. Without an explanation  
26 from Smith about her role and her qualifications that make her a responsible official of  
27 Ralphs, the Region cannot accept her certification.

1 Notices are critically important to the Board's remedies - as Chief Justice William  
2 Rehnquist reinforced in *Hoffman Plastics Compound v. NLRB*, the Board's order that the  
3 employer "conspicuously post a notice to employees setting forth their rights under the  
4 NLRA and detailing its prior unfair practices" is a "significant sanction[.]" 535 U.S. 137,  
5 152 (2002). To be taken seriously by employers, the Region must require the  
6 information necessary to ensure the actions constituting compliance occurred.  
7 The General Counsel and the Region propose a lesser standard for employer  
8 compliance that workers cannot afford during this period of assault on workers and  
9 Congressional disillusion with the Board's relevance.

10 **C. Ralphs Violated Board Order By Failing To Post Notices Electronically**

11 Ralphs failed to comply with the Ninth Circuit Order by not posting the remedial  
12 notice for affected employees electronically via their intranet or internet, a requirement  
13 of pending cases pursuant to the Board's Order in *J&R Flooring, Inc.*, issued  
14 October 22, 2010.

15 The Board decided in *J&R Flooring* that respondents "should be required to  
16 distribute remedial notices electronically when that is a customary means of  
17 communicating with employees or members" since "the continuing efficacy of the  
18 Board's remedial notice is in jeopardy" given "the increasing reliance on electronic  
19 communication and... decrease in the prominence of paper notices..." 356 NLRB No. 9,  
20 1, 4 (2010). *J&R Flooring* at 3.

21 Ralphs' homepage, [www.Ralphs.com](http://www.Ralphs.com), contains a link at the bottom of the page  
22 titled "ExpressHR/ Associates." This link leads to a password-protected portal for  
23 employees. Employees likely access this portal to seek information such as updates  
24 about their company, or in this case, notice of their rights under the National Labor  
25 Relations Act. Such a mechanism would not be created or utilized unless it was more  
26 convenient for Ralphs or served a purpose physical messages in stores could not.

1 Ralphs likely uses the intranet as a customary means for communication with its  
2 employees, and should therefore be required to post the Notice to employees on its  
3 intranet site.<sup>6</sup>

4 The General Counsel denied Charging Parties' appeal based on its reasoning  
5 that 1) retroactive application of *J&R Flooring* was inappropriate because the Ninth  
6 Circuit Order "pre-dated the issuance of *J&R Flooring* and the Respondents had already  
7 fully complied with its Notice posting requirements" when the decision was issued, and  
8 2) there was insufficient evidence of the function of Ralphs' intranet site and its actual  
9 function and usage by employees.

10 The General Counsel erred in its conclusion to bypass the Board's decision  
11 because though *J&R Flooring* issued while Ralphs was in the compliance stage,  
12 "new policies and standards" should be applied "retroactively 'to all pending cases in  
13 whatever stage,' *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal*  
14 *Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)), unless application in a particular case  
15 would work a 'manifest injustice.'" *Id.* at 6. (retroactive application of e-posting policy  
16 ordered where parties would likely not have acted any differently if the policy had been  
17 in effect prior to the events giving rise to the case). In *Jackson Hospital Corporation*, the  
18 Board found no basis for departing from its "usual practice" of retroactive application  
19 of a policy where the new practice concerned a remedial issue, "not adopting a new  
20 standard concerning whether certain conduct is unlawful." 356 NLRB No. 8, 5 (2010).  
21 And absent a manifest injustice, the Board has certainly applied new policies  
22 retroactively after orders have issued, even during compliance proceedings.  
23 *The McBurney Corporation*, 352 NLRB No. 112 (2008).

24 The Board policy that notices be posted or mailed electronically is a remedial  
25 issue. Ralphs could not effectively argue that it relied on existing law, and any injustice

26  
27 <sup>6</sup> In applying the policy, ALJs have ordered similarly situated, and even smaller food  
28 retail companies to follow electronic posting requirements. *Landmark Family Foods, Inc.*,  
NLRB Division of Judges, Cases 8-CA-37667, 8-CA-38794 (November 2, 2010).

1 asserted would be laughable when balanced with the importance of keeping the Board's  
2 notice remedy relevant. The Region also conveniently deliberated for four months  
3 before finally issuing its decision not to require Ralphs to post the Notice electronically  
4 *one day after* it issued its Compliance Determination closing the case.<sup>7</sup> There was no  
5 timely notice to Charging Parties.

6 Finally, even if "there is insufficient evidence site's] actual function and actual  
7 usage by employees," the Region should put the burden on Ralphs to show that it does  
8 not use its intranet to communicate with employees. Excusing Ralphs from fulfilling a  
9 Board requirement simply because there is a lack of evidence is absurd when the  
10 evidence necessary is password-protected and can only be accessed by Ralphs.

11 **D. Ralphs' Certifications Of Compliance Do Not Satisfy The Ninth Circuit**  
12 **Order**

13 In the Ninth Circuit Order, provision 2(c) requires Ralphs to file with the Region  
14 certifications of "a responsible official" detailing the steps taken to comply with the  
15 Order. Not a single one of the certifications describe the duties and responsibilities of  
16 the certifying officials or their roles in the 2003-2004 lockout which would make them a  
17 responsible official for the purposes of certifying to the steps taken to comply with the  
18 Order. The substance of the certifications are also uninformative and inadequate.

19 **Notice Posting and Mailing Requirements** – As stated above, certifications by  
20 Personnel Director Smith were insufficient in that not only did Ralphs fail to show how  
21 Smith was a responsible official with knowledge of the information she was certifying  
22 to, but her certification left gaps in the information Board rules require from  
23 respondents to demonstrate compliance with notice requirements.

24 **Information Disclosure Requirements** – Ralphs filed with the Region statements  
25 from Senior Labor Relations Representative De-Guia Jones, and outside counsel Ryan,  
26

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27 <sup>7</sup> Charging Parties contacted the Region October 29, 2010, but the Region did not issue a  
28 decision until March 4, 2011, one day after the Compliance Determination was  
completed.

1 certifying the steps it took to comply with the Ninth Circuit Order. These certifications  
2 do not comply with 2(c) for several reasons.

3 First, neither De-Guia Jones nor Ryan are responsible officials. De-Guia Jones is  
4 one of four Senior Labor Relations Officers that covers the Southern California stores.  
5 She cannot appropriately address these issues without any further explanation of her  
6 qualifications.

7 Ryan was the sole labor counsel for Ralphs during the lockout in dealing with  
8 the Region. When the Region began "investigating allegations that RALPHS was  
9 secretly rehiring locked-out employees under false names and social security  
10 numbers,..." Ryan "made materially false statements to the NLRB to defeat the Unions'  
11 unfair labor practice charges that RALPHS was engaged in an illegal selective lockout."<sup>8</sup>

12  
13 <sup>8</sup> Under Count 52, "False Statement To Federal Agency," of the U.S. Attorney's  
14 indictment against Ralphs, Part II with heading "RALPHS' FEBRUARY 4, 2004 FALSE  
15 STATEMENTS TO THE NLRB" states in part:

16 "153. ...on or about February 4, 2004, RALPHS caused its labor counsel to send a letter  
17 to Region 31 containing the following materially false and fraudulent representations:

- 18 a. '[I]t is important to note at this juncture that Ralphs' policy forbids the conduct  
19 alleged in the [Unions'] charges';...
- 20 b. Any 'breaches of Ralphs' own policy [have been] apparently isolated and  
21 sporadic';...
- 22 g. 'Ralphs has made a concerted effort to prevent and remedy breaches of its policy  
23 since the beginning of the lockout';...
- 24 l. 'Ralphs... has not done anything contrary to the legitimate interests of the  
25 employees and their unions that needs to be justified';

26 154. As RALPHS well knew, these representations were false and fraudulent because:

- 27 a. RALPHS' hiring of locked-out employees was pervasive and systematic, and not  
28 isolated or sporadic
- b. RALPHS' hiring of locked-out employees was a company-wide practice and  
policy;
- d. RALPHS' actual policy was to permit, encourage, condone and deliberately  
ignore the hiring of locked-out employees;
- f. RALPHS had made only minimal efforts to prevent the rehiring of locked-out  
employees;
- h. RALPHS' hiring of hundreds of locked-out employees under false names and  
social security numbers was contrary to the interests of their employees and their

1 *Indictment* at 21, paragraph 53, *Ralphs Grocery*. Ralphs' use of Ryan to deceive the  
2 Region compromises the veracity of his compliance certification.

3       The unreliability of Ryan's commitments on behalf of Ralphs when it  
4 continuously failed to satisfy its end of the stipulated agreement with the Board further  
5 shows that Ralphs continues to manipulate the Board through Ryan. Ralphs ignored  
6 the agreement for such an extended period the Board was forced to invalidate the  
7 stipulation and proceed with a summary enforcement of its order through the Ninth  
8 Circuit. Only after the Ninth Circuit issued a judgment against Ralphs was it willing to  
9 begin steps toward complying with the Board order from more than a year and a half  
10 prior.

11       It is clear from these events that Ralphs will use Ryan to do and say anything,  
12 and that he certainly has no accountability for Ralphs' actions. The Board should not  
13 permit Ryan to act as an official of Ralphs in certifying the actions. Moreover, it was  
14 Ralphs' highest level of management that orchestrated the lockout according to findings  
15 during the federal criminal proceedings. Only a truly responsible Ralphs official would  
16 have the most direct knowledge of the steps necessary to satisfy the Order and direct  
17 knowledge of steps actually taken to locate the documents and compile the information  
18 requested by Charging Parties. The certifier must be an actual official and employee of  
19 Ralphs rather than its outside counsel or an outside representative.

20  
21       Unions as it: (i) exposed employees who worked under false names, social security  
22 numbers, and documentation to criminal prosecution; (ii) undermined Union solidarity  
23 and morale; (iii) deceived the Unions in matters crucial to their negotiating positions  
24 and strategy; and (iv) allowed RALPHS to mitigate the economic harm that the labor  
action was causing it;" *Indictment* at 95-97, *U.S. v. Ralphs Grocery Company*, No. CR-05-  
1210-PA (C.D. Cal. June 2004).

25       The Region's file on the withdrawn unfair labor practices discloses that Ryan was  
26 the labor counsel in February 2004. (See withdrawal in 2006 of the earlier unfair labor  
27 practice charges filed against Ralphs about the 2003-2004 lockout. The matters were  
28 resolved with the approval of then General Counsel Ronald Meisburg after conferring  
with Zachery Fassman of Paul Hastings and this office in order for Ralphs to pay over  
\$55 million of restitution to Ralphs' employees after the criminal conviction. The appeal  
was closed by then General Counsel Ronald Meisburg's Office of Appeals in 2006.)

1 Secondly, the content of both certifications is nonsensical and incomprehensive.  
2 DeGuia-Jones states that "attorneys from Thelen Reid began requesting information  
3 concerning certain persons, attempting to determine if they were locked out employees  
4 who had worked using false identities during the labor dispute." She does not identify  
5 how the "certain persons" from whom information was requested were identified, the  
6 number of "certain persons" there were, or the number of people out of the "certain  
7 persons" who were discovered to have worked using false names and Social Security  
8 numbers during the 2003-2004 lockout, later identified on the "X-list." The information  
9 is incomplete and leaves much to be desired.

10 Ryan's certification similarly illustrates the inadequacy of the steps taken to  
11 comply with the Ninth Circuit Judgment. His explanation of the steps completely  
12 explains the incomplete and nonresponsive set of documents received by Charging  
13 Parties. According to Ryan, the documents that employees provided in response to the  
14 Kasper letters were in the possession of Linda Husar of a law firm, Reed Smith.  
15 Reed Smith had never represented Ralphs, nor had it ever been retained by Ralphs.  
16 Husar allegedly took the documents with her to that firm when her old firm,  
17 Thelen Reid, which at one point represented Ralphs, went out of business.<sup>9</sup> This raises  
18 significant concerns over the chain of custody of those documents and the absence of  
19 any attestation from Husar regarding her domain over the documents or explanation of  
20 her relationship to the documents. It is extremely suspect that these Kasper letters,  
21 property of Ralphs, would be placed at a law firm to which Ralphs had no relation.  
22 The letters were even kept there after Ryan allegedly "went through those records."

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23  
24 <sup>9</sup> Before Thelen Reid went bankrupt, it had undergone an investigation from 2004-2005  
25 by the U.S. Attorney for its obstruction of justice during the U.S. Attorney's  
26 investigation of Ralphs' lockout. Ryan, Ralph's sole labor counsel in dealing with the  
27 Region during its early investigations of the lockout, had also given testimony before  
28 the Grand Jury regarding false written statements to the Region (Ralphs, in cooperating  
with the U.S. Attorney, waived the attorney-client privilege before the Grand Jury). In  
early December 2005, Thelen Reid was necessarily replaced as Ralphs' criminal defense  
counsel by Paul Hastings.

1 It is also inconceivable to any practitioner why Ralphs' documents were not  
2 passed from Thelen Reid to Paul Hastings when Paul Hastings took over representation  
3 of Ralphs in its criminal proceedings, prior even to Thelen Reid's bankruptcy.  
4 Paul Hastings also replaced Ryan in the unfair labor practices on appeal before the  
5 General Counsel of the Board around the same time. And even still for purposes of the  
6 information production, if Mr. Behre from Paul Hastings in fact possessed all of the  
7 other information responsive to Charging Parties' request as Ryan attested, then it is  
8 senseless why Ryan waited to cross-check any other information with documents in  
9 Mr. Behre's possession rather than go directly to him.

10 The General Counsel fails to mention these issues in its denial of Charging  
11 Parties' appeal. It does not address the inadequacy of the steps taken by Ralphs to  
12 comply, its consideration of what constitutes a "responsible official" or the fact that  
13 Ryan is not a responsible official of Ralphs, or Ralphs' continued manipulation of  
14 Ryan's acts.

15 The Region should order Ralphs to locate and produce documents responsive to  
16 the information requested by Charging Parties, and then issue a new certification  
17 attesting to the steps taken. Ralphs should also complete a new certification attesting to  
18 the steps taken, signed by a truly responsible Ralphs official with oversight and  
19 accountability over the matters related to the requests.

## 20 CONCLUSION

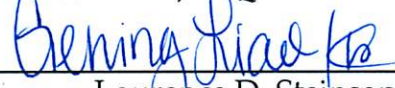
21 The Board *must enforce its own orders* and in this case, require Ralphs to furnish  
22 evidence, demonstrating *compliance with each element of each order*, especially when  
23 the Ninth Circuit has required its enforcement. It cannot merely accept general  
24 statements, without evidence they are even from responsible officials of Ralphs,  
25 asserting that compliance has occurred. For all of the foregoing reasons demonstrating  
26 Ralphs' failure to comply with the Ninth Circuit Order, the Board should overturn the  
27 General Counsel's decision and the Region should require Ralphs to comply with the  
28 Order in a manner consistent with the law, summarized as follows:



- Post notices in conspicuous locations within all 325 stores and certify to the Region the specific locations the notices were posted in each store.
- Mail paper notices and identify to the Region the manner of mailing and notices that were returned as undelivered.
- Post notice via Ralphs' Intranet.
- Complete a thorough search to identify, locate and furnish documents to Charging Parties that are responsive to Charging Parties' initial information request, detailed in the February 2008 Board Order. The search should occur under the supervision of a responsible official of Ralphs, not Ryan or any other outside representative.
- Submit affidavits from responsible officials of Ralphs, which are Ralphs employees with direct knowledge of the steps and efforts Ralphs takes to comply with the information request and notice posting and mailing requirements, to attest to not only the steps taken, but also the qualifications and duties of the attesting official.

RESPECTFULLY SUBMITTED BY:

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